

JUL 12 1976

MICHAEL ROYAL

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 75-1834

IOWA MOVERS AND WAREHOUSEMEN'S ASSOCIATION

Petitioner,

vs.

DONALD G. BRIGGS, DIRECTOR OF IOWA DEPARTMENT
OF REVENUE, AND IOWA DEPARTMENT OF REV-
ENUE,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court
Of The State of Iowa

BRIEF FOR RESPONDENT IN OPPOSITION

Richard C. Turner
Attorney General of Iowa
Stephen C. Robinson
Special Assistant Attorney General
Lucas State Office Building
Des Moines, Iowa 50319
Attorneys for Respondent

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Question Presented	2
Statement of the Case	2
Argument	3
Conclusion	6

LIST OF AUTHORITIES CITED

	PAGE
CASES:	
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	4
<i>Congress of Industrial Organizations v.</i> <i>McAdory</i> , 325 U.S. 472 (1945)	4
<i>Federal Communication Commission v. WJR,</i> <i>The Goodwill Station, Inc.</i> , 337 U.S. 265 (1949) . . .	5
<i>Monks v. New Jersey</i> , 398 U.S. 71 (1970)	4
<i>Street v. New York</i> , 394 U.S. 576 (1969)	4

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

IOWA MOVERS AND WAREHOUSEMEN'S ASSOCIATION

Petitioner,

vs.

DONALD G. BRIGGS, DIRECTOR OF IOWA DEPARTMENT
OF REVENUE, AND IOWA DEPARTMENT OF REV-
ENUE,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court
Of The State of Iowa

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Iowa delivered on January 21, 1976 is appended to the Petition for Writ of Certiorari and is reported at 237 NW 2d 759 (Iowa 1976). The Iowa Supreme Court's Order delivered on March 12, 1976, denying the Petition for Rehearing is not officially reported, but is appended to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3). However, Petitioner has not complied with Rule 23(1)(f) of Supreme Court Rules which require a showing how the federal question was timely and properly raised so as to give this Court jurisdiction. Moreover, as can be gleaned from the Petition for Rehearing filed by the Petitioner with the Iowa Supreme Court, Petitioner, although having had an opportunity to do so, has never raised the federal question contained in its Petition for Writ of Certiorari to this Court in the Iowa Supreme Court and that Court has had no opportunity to pass upon the question. Therefore, Petitioner has raised the federal question for the first time in this Court and, as a consequence, this Court does not have jurisdiction to grant a Writ of Certiorari under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

Respondent does not question the constitutional provisions as set forth in the Petition for Writ of Certiorari.

QUESTION PRESENTED.

Whether it is a denial of due process to deny a rehearing *en banc* to a party whose three-two majority of the five Justices physically present at the giving of the parties' oral arguments recorded by mechanical means on tapes is overcome in a five-four decision *en banc* where there is no showing that the other four Justices did not listen to said tapes.

STATEMENT OF THE CASE

The oral arguments of the parties' counsel was held, after filing of an Appendix and the parties' briefs, before a panel of

the Iowa Supreme Court consisting of the Chief Justice and four of the remaining eight Justices on October 10, 1975 with argument time limited to twenty minutes for each party and five minutes for reply by Petitioner. The arguments were recorded by mechanical means on tapes, as is the Court's normal practice, and the taped arguments are available to all members of the Court for the purpose of listening to them.

The *en banc* opinion of the Iowa Supreme Court was issued on January 21, 1976, and affirmed the Trial Court in a five-four decision. Of the five justices physically present when oral argument was made, three voted for the Petitioner and two for Respondent. Of the four Justices not present, three voted for Respondent and one for Petitioner.

The Petitioner filed a petition for rehearing with the Iowa Supreme Court requesting an *en banc* rehearing, but did not, in any manner, place the Court on notice that Petitioner felt the Court had deprived it of due process of law. The Court, upon consideration by all Justices of Petitioner's request for rehearing, denied same on March 12, 1976 and issued *Procedendo* on March 15, 1976.

ARGUMENT

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION WHICH PRESENTS A FEDERAL QUESTION THAT WAS NEVER RAISED IN THE COURT BELOW.

Petitioner, in its Petition for Writ of Certiorari, purports to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). Yet, nowhere in its Petition, does Petitioner disclose how it raised the federal question, which it presents to this Court, timely and properly in the Iowa Supreme Court. See Rule

(23(1)(f) of United States Supreme Court Rules. If the State Supreme Court did not pass upon a constitutional question which was not properly presented to that Court for determination, the United States Supreme Court is without jurisdiction to consider the question in the first instance raised in a petition for a writ of certiorari under 28 U.S.C. 1257(3). *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1945). Petitioner had an opportunity to raise this federal question in the Iowa Supreme Court, particularly by filing a timely petition for rehearing. And, while Petitioner did file a petition for rehearing with the Court below, nowhere did it raise the federal question or give that Court an opportunity to pass upon it. Under these circumstances, it is clear that this Court has no jurisdiction to consider the federal question raised for the first time in Petitioner's Petition for Writ of Certiorari.

IT IS NOT A DENIAL OF DUE PROCESS TO DENY A REHEARING EN BANC TO A PARTY WHOSE THREE-TWO MAJORITY OF THE FIVE JUSTICES PHYSICALLY PRESENT AT THE GIVING OF THE PARTIES' ORAL ARGUMENTS RECORDED BY MECHANICAL MEANS ON TAPES IS OVERCOME IN A FIVE-FOUR DECISION EN BANC WHERE THERE IS NO SHOWING THAT THE OTHER FOUR JUSTICES DID NOT LISTEN TO SAID TAPES. ~

Assuming, without conceding, that this Court has jurisdiction in the instant case to grant a Writ of Certiorari, no substantial federal question is presented by Petitioner.

The hearing before the five Justice panel of the Iowa Supreme Court consisted of oral argument of twenty minutes for each party and five minutes for reply by Petitioner. The oral arguments were taped by mechanical means in full view of

counsel presenting such arguments and no party, prior to such arguments, requested an *en banc* hearing before the full Court. The taped arguments are obviously available to all members of the Court to listen to and Petitioner has made no showing or contention that any or all of the four Justices not physically present when oral arguments were made did not listen to the tapes. Indeed, had petitioner raised this due process question in its petition for rehearing with the Iowa Court, an opportunity would have been presented to determine the actual extent to which the other four Justices listened to the tapes of the parties' oral arguments. Petitioner's failure to seasonably raise the question in the Iowa Court requires this Court to find that all of the Iowa Supreme Court Justices heard the oral arguments. It is more reasonable to assume that the absent Justices voted after judiciously investigating the oral arguments on the tapes than to conclude that the tapes were made idly and not heard. Besides, the arguments are not very long and would seem to be of less importance than the parties' written briefs and the record made in the trial Court, all of which each Justice had copies thereof. As Petitioner recognizes, there is no constitutional right to oral argument. *Federal Communication Commission v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949).

Under these circumstances, Petitioner was granted an adequate hearing before the Iowa Supreme Court in which to present its case and the procedures utilized by the Court do ensure that all of the Justices participating in the Court's decision will hear the oral arguments of the parties.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that this cause should not be reviewed by this Court.

Respectfully submitted,

Richard C. Turner
Attorney General of Iowa

Stephen C. Robinson
Special Assistant Attorney
General

Lucas State Office Building
Des Moines, Iowa 50319

Attorneys for Respondent